

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CURTIS E. MILLER,
Petitioner,

v.

L.S. McEWEN, Warden,
Respondent.

NO. CV 11-7907-GW (AGR)

ORDER TO SHOW CAUSE

On September 23, 2011, Petitioner filed a Petition for Habeas Corpus pursuant to 28 U.S.C. § 2254. For the reasons discussed below, it appears the court does not have jurisdiction to consider the petition and, even if it does, the one-year statute of limitations has expired.

The court, therefore, orders Petitioner to show cause, on or before **November 4, 2011**, why it should not recommend dismissal of the petition with prejudice based on lack of jurisdiction or expiration of the one-year statute of limitations.

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I.

PROCEDURAL BACKGROUND

In 1980, Petitioner was charged with kidnapping for robbery and robbery. (Petition Attached at 5.) After a jury trial of Petitioner and a co-defendant, the co-defendant was convicted, but the jury hung with respect to Petitioner. (*Id.* at 5-6.) Subsequently, Petitioner pled guilty and was sentenced to prison.¹ (*Id.* at 7.) Petitioner does not indicate that he appealed the 1980 conviction.

In 1997, Petitioner was convicted of being a felon in possession of a firearm, and his sentence was enhanced because of the prior convictions in the 1980 case. (*Id.*)

Petitioner filed a number of state habeas petitions starting in about 2005 and continuing into 2011, which were all denied. (Petition at 4-5 & Attachments D, E, F, & G.)²

Petitioner filed his federal habeas petition on September 23, 2011, challenging the 1980 conviction based on ineffective assistance of counsel.³

II.

JURISDICTION

“Section 2254(a)’s ‘in custody’ requirement “has been interpreted to mean that federal courts lack jurisdiction over habeas corpus petitions unless the

¹ Petitioner does not state the charges to which he pled guilty or the term of his sentence.

² Because Petitioner does not attach the state habeas petitions themselves, only the denials, it is unclear what he contended and whether they related to his 1980 conviction or his 1997 conviction. For the purpose of determining whether the petition is time-barred, it is immaterial.

³ In the form part of the petition, Petitioner appears to challenge the 1997 convictions. (Petition at 2.) However, the sole ground makes it clear he is challenging his 1980 conviction. (See Petition at 5 & Attached argument.) In addition, in response to an application to file a second or successive petition in the Ninth Circuit, the Appellate Commissioner reached the same conclusion. *Miller v. Small*, Case No. 11-72376, Dkt. No. 3 (“A review of that application, however, demonstrates that petitioner seeks to file an original petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.”).

petitioner is under the conviction or sentence under attack at the time his petition is filed.” *Bailey v. Hill*, 599 F.3d 976, 978-79 (9th Cir. 2010) (citation and quotation marks omitted). “[O]nce the sentence imposed for a conviction has completely expired, the collateral consequences of that conviction are not themselves sufficient to render an individual ‘in custody’ for the purposes of a habeas attack upon it.” *Maleng v. Cook*, 490 U.S. 488, 492, 109 S. Ct. 1923, 104 L. Ed. 2d 540 (1989) (per curiam), “[W]hat matters is that [the conditions and restrictions of the petitioner’s release] restrain petitioner’s liberty to do those things which in this country free men are entitled to do.” *Jones v. Cunningham*, 371 U.S. 236, 243, 83 S. Ct. 373, 9 L. Ed. 2d 285 (1963).

Petitioner is not in custody as a result of the 1980 conviction but as a result of the 1997 conviction. Therefore, the court does not have jurisdiction to consider the petition.

III.

STATUTE OF LIMITATIONS

The petition was filed after enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (“AEDPA”). Therefore, the Court applies the AEDPA in reviewing the petition. *Lindh v. Murphy*, 521 U.S. 320, 336, 117 S. Ct. 2059, 138 L. Ed. 2d 481 (1997).

The AEDPA contains a one-year statute of limitations for a petition for writ of habeas corpus filed in federal court by a person in custody pursuant to a judgment of a state court. 28 U.S.C. § 2244(d)(1). The one-year period starts running on the latest of either the date when a conviction becomes final under 28 U.S.C. § 2244(d)(1)(A) or on a date set in § 2244(d)(1)(B)-(D).

A. The Date on Which Conviction Became Final – § 2244(d)(1)(A)

Petitioner was convicted in 1980. Because Petitioner did not appeal, his conviction became final 60 days later. California Rules of Court 8.308(a) (formerly Rule 30.1). Because the conviction became final before the AEDPA

1 was enacted, the limitations period expired on April 24, 1997. *Laws v. Lamarque*,
2 351 F.3d 919, 921 (9th Cir. 2003). Absent tolling, the petition is time-barred.

3 1. Statutory Tolling

4 The statute of limitations is tolled during the time “a properly filed
5 application for State post-conviction or other collateral review with respect to the
6 pertinent judgment or claim is pending.” 28 U.S.C. § 2244(d)(2). Because
7 Petitioner did not file his first state habeas petition until 2005, he is not entitled to
8 statutory tolling. See *Welch v. Carey*, 350 F.3d 1079, 1081-84 (9th Cir. 2003)
9 (state habeas petition filed after the limitations has expired does not revive the
10 expired limitations period).

11 2. Equitable Tolling

12 “[T]he timeliness provision in the federal habeas corpus statute is subject to
13 equitable tolling.” *Holland v. Florida*, 130 S. Ct. 2549, 2554, 177 L. Ed. 2d 130
14 (2010). “[A] ‘petitioner’ is ‘entitled equitable tolling’ only if he shows ‘(1) that he
15 has been pursuing his rights diligently, and (2) that some extraordinary
16 circumstance stood in his way’ and prevented timely filing.” *Id.* at 2562 (quoting
17 *Pace v. DiGuglielmo*, 544 U.S. 408, 418, 125 S. Ct. 1807, 161 L. Ed. 2d 669
18 (2005)). “The diligence required for equitable tolling purposes is “reasonable
19 diligence,” not “maximum feasible diligence.” *Id.* at 2565 (citations and quotation
20 marks omitted). The extraordinary circumstances must have been the cause of
21 an untimely filing. *Pace*, 544 U.S. at 418. “[E]quitable tolling is available for this
22 reason only when ““extraordinary circumstances beyond a prisoner’s control
23 make it *impossible* to file a petition on time”” and ““the extraordinary
24 circumstances” were the *cause* of [the prisoner’s] untimeliness.”” *Bills v. Clark*,
25 628 F.3d 1092, 1097 (9th Cir. 2010) (citations omitted, emphasis in original).

26 There is no indication in the petition that Petitioner is entitled to equitable
27 tolling.

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1 **Petitioner is also advised that if he fails to timely respond to this**
2 **Order to Show Cause, the court will recommend that the petition be**
3 **dismissed with prejudice based on lack of subject matter jurisdiction.**

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5 DATED: October 4, 2011

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7 ALICIA G. ROSENBERG
8 United States Magistrate Judge